

[Cite as *Westlake v. Zidan*, 2010-Ohio-1577.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93084

CITY OF WESTLAKE

PLAINTIFF-APPELLEE

vs.

NAHED ZIDAN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Rocky River Municipal Court
Case No. 08 CRB 2690

BEFORE: Boyle, J., Dyke, P.J., and Jones, J.

RELEASED: April 8, 2010

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Nahed Zidan, appeals his domestic violence conviction. He raises three assignments for our review:

{¶ 2} “[1.] Ineffective assistance of counsel led to the Defendant being convicted of a crime not supported by the evidence.

{¶ 3} “[2.] Appellant’s right under the 6th Amendment of the United States Constitution and under Article 6, Section 10 of the Ohio Constitution are violated because Appellant could not effectively confront the witness against him because of the language barriers.

{¶ 4} “[3.] The prosecution, in its case in chief, presented testimony that demonstrates the affirmative defense of self-defense.”

{¶ 5} Finding no merit to his appeal, we affirm.

Procedural History and Factual Background

{¶ 6} In November 2008, a complaint for domestic violence was filed against Zidan in the Rocky River Municipal Court. A temporary protection order was issued for the alleged victim, his wife, Hanan Abu Hamdeh (“Abu Hamdeh”). The case proceeded to a jury trial in February 2009, where the following evidence was presented.

{¶ 7} Ian Cragel testified that he lived in the apartment above Zidan and Abu Hamdeh, but said that he did not know them. He explained that around 4:45 p.m. on November 20, 2008, he left his apartment to go to work. When he got outside, he heard a woman “screaming out her window” from a second-floor

apartment to call the police. The woman yelled, “he’s beating me, he’s killing me, I’m pregnant.” He further said that the woman “kept saying, he’s killing me, he’s killing me.” The woman also pointed to her face and screamed, “you can see the blood.” But Cragel testified that he could not see the blood because she was yelling through a screen. He said that he had heard two people fighting while he was still in his apartment, but that it was muffled. Prior to leaving, he saw the woman on her balcony, crying and yelling into the phone in Arabic. He called 911 on his way to work.

{¶ 8} Officer John Jereb testified that he, Sergeant Kent Mittelstaedt, and Officer Christopher Holmes reported to the Westown Garden Apartments after receiving a dispatch of “an Arabic woman on the second floor, screaming for someone to call the police because her husband was beating her up, and she was pregnant.”

{¶ 9} They arrived at the apartment and Zidan invited them in. According to police procedure, the officers immediately separated Zidan and Abu Hamdeh. Officer Jereb spoke to Zidan in the apartment, and Sergeant Mittelstaedt spoke to Abu Hamdeh in the hallway. Officer Jereb asked Zidan what happened. Zidan told him that he had gotten into a verbal argument with his wife. At that point, Officer Holmes noticed a tissue on the kitchen counter that had blood on it and noticed a spot of blood on the carpet. Officer Jereb then asked Zidan where the blood had come from and Zidan told him that his wife “had hit herself, and she was bleeding from the teeth.”

{¶ 10} Officer Jereb identified photographs taken of Abu Hamdeh on the day of the alleged incident. Abu Hamdeh had blood on her shirt near her “sternum” and also on her left sleeve.

{¶ 11} Officer Jereb testified that the entire time he was talking to Zidan, he understood him completely and was able to communicate with him. And Zidan never told Officer Jereb that he could not understand him.

{¶ 12} Officer Holmes corroborated Officer Jereb’s testimony and further explained that after he told Officer Jereb about the blood on the carpet and on the tissue, he went into the hallway to tell Sergeant Mittelstaedt. Abu Hamdeh told the officers that she was “struck in the face by her husband,” that she used the tissue to wipe up the blood, and that the blood on the carpet was from “the initial impact.”

{¶ 13} Abu Hamdeh testified that she and Zidan had been married for four years. They were married in Jerusalem in 2004; Zidan came to the United States after their first child was born in 2005. She came to the United States in January 2008.

{¶ 14} Abu Hamdeh said that she completed school through the sixth grade, her only source of income was her husband, and she did not drive. She said that she loves her husband, and he is the father of her three-year-old daughter and her unborn child. She further stated that she wants her husband to be with her and the children.

{¶ 15} Abu Hamdeh testified that on the day of the incident, she and Zidan got into an argument. She said, “we had an argument about smoking in the house because that day, it was cold. It was winter on November 28th, it was very cold, and I told him to go smoke outside and he put his jacket, and he was to leave and I tried to stop him, and his hand bumped my nose.” The state asked, “His hand bumped your nose?” Abu Hamdeh replied, “Yes. And bleeding from my nose.” The state then asked, “you and I have talked right, before this?” Hamdeh replied, “yes, like slapping me.” Abu Hamdeh said that when Zidan hit her, she was in the living room.

{¶ 16} Abu Hamdeh further testified that when Zidan slapped her on her nose, it bled. She explained that she used a napkin to wipe her nose, and that her blood also got on the carpet and on her shirt. The state offered into evidence photographs of the tissue, the carpet, and her shirt, all containing blood, which Abu Hamdeh testified to accurately representing what she looked like that day and what the tissue and carpet looked like that day.

{¶ 17} Abu Hamdeh said that after Zidan hit her, she went into her bedroom and yelled out her window to her neighbor. “And I told him to call the cops, my husband’s hitting me, that’s it.” She also told the neighbor that she was pregnant, but she denied that she told him that her husband said he was going to kill her. Abu Hamdeh further explained that after Zidan hit her, she called her mother in Jerusalem because she and Zidan were arguing, and that her mother talked to Zidan during the conversation also.

{¶ 18} Abu Hamdeh gave a written statement to police on the day of the incident. She said that she never had trouble understanding the police officers or the prosecutor. In her statement, she wrote:

{¶ 19} “I tolde him to go and smoke outside and he sade no and then I screem on him and he smaced me on my face — left and I told the nabeer to call police and then they came but I want you to tell him this is the first tim and the lest time he hite me. When he hite me it was in the living room.” (Errors in original.)

{¶ 20} The prosecutor then asked Abu Hamdeh again what they were arguing about and she replied, “when I told him, and he wears his jacket, and he was going to leave, and I stopped him from the back, and his hand bumped my nose.” The state replied, “Okay. This term is ‘bumped.’ It is so very different from what you told my officer, what you’ve told me and what you wrote in your statement.” Abu Hamdeh responded, “No. The same thing, how I told you how I told the officers. When I stopped him from the back of his jacket, he didn’t look at me when he slapped me. He went like this. It came on my nose, and then it bleded.” Abu Hamdeh agreed that in her written statement she never said the word “bump,” and that she referred to it as a “smack.”

{¶ 21} On cross-examination, Abu Hamdeh further explained what happened that day. She said that Zidan was going to leave their apartment because of the argument they had gotten into over him smoking in the house. She said that she got upset that he was going to leave and she grabbed the back of his jacket. She demonstrated how she grabbed Zidan’s jacket. Defense counsel

stated, “[I]et the record reflect that the witness has grabbed my suit jacket from the center of my scapula, or my shoulder blade.” Abu Hamdeh said that when she did that, Zidan turned around and hit her. But she testified that she did not think that he intended to hit her in the face. She further explained that she asked the neighbor to call the police to scare her husband. And she agreed that she was upset and angry because he had never done that before.

{¶ 22} Abu Hamdeh further explained on cross-examination that she believed “bumped” and “smacked” meant the same thing, but “hit” meant something different.

{¶ 23} On redirect examination, Abu Hamdeh agreed that she was now claiming that she started the fight by grabbing Zidan’s jacket, although she admitted that she never told police that. She further admitted that she did not state that in her written statement, and she never told the prosecutor that prior to the trial. Sergeant Mittelstaedt testified that when he interviewed Abu Hamdeh in the hallway, she told him that she and Zidan had gotten into a fight about him smoking and that Zidan hit her. Sergeant Mittelstaedt said he “clarified” what she meant by hit, and Abu Hamdeh told him that “it was with an open hand on the left side of her face.” He said that she never used the word “bumped.” Sergeant Mittelstaedt also asked Abu Hamdeh what the stains were on her blouse, and she told him that it was from her nose after Zidan struck her.

{¶ 24} After talking with Abu Hamdeh, Sergeant Mittelstaedt decided to arrest Zidan for domestic violence.

{¶ 25} The state rested, and Zidan moved for a Crim.R. 29 acquittal, which the trial court denied. Zidan then put Abu Hamdeh back on the stand.

{¶ 26} Abu Hamdeh testified that she never told the police or the prosecutor that she grabbed her husband's jacket before because she was nervous and she was afraid that she would be arrested. On cross-examination, the state asked her "[i]f he didn't do it intentionally, why would you call the police?" Abu Hamdeh replied, "I was mad. I was nervous." On redirect examination, she explained that by "nervous," she meant that she was angry and scared.

{¶ 27} The jury found Zidan guilty of domestic violence. The trial court sentenced him to two years of community control sanctions, and fined him \$350.

Ineffective Assistance of Counsel

{¶ 28} In his first assignment of error, Zidan argues that his trial counsel was ineffective for failing to request that an interpreter be provided for both Zidan and Abu Hamdeh. Zidan claims that "[i]n the only document filed by counsel before the trial, counsel makes no mention of the language barrier." He further asserts that "[i]t would be considered reasonable under any standard to ensure not only that your client understands the court but also that the court can understand them[,] and "[i]t is also reasonable to ensure that the complaining witness could comprehend the proceedings and that the court could understand the testimony."

{¶ 29} To succeed on a claim of ineffective assistance, a defendant must establish

{¶ 30} “both that ‘counsel’s representation fell below an objective standard of reasonableness,’ and that there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Smith v. Spisak* (2010), ___ U.S. ___, 130 S.Ct. 676, 685, 688, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 31} First, although there is no entry indicating that the trial court appointed an interpreter, according to the transcript Zidan did have one during his trial (“helping him with some of the translation”).¹

{¶ 32} Second, there is nothing in the record to indicate that Abu Hamdeh could not speak English, understand English, or effectively communicate in English. She gave a written statement to police in her own handwriting in English. And although she did not correctly spell many of the words, it is clear that she could communicate effectively. Further, she testified at length during Zidan’s trial, and it is equally apparent from her testimony that she could not only speak English, but she could understand it too.

{¶ 33} Moreover, three police officers testified that during their investigation, there was no question in their minds that both Zidan and Abu Hamdeh could speak and understand English.

¹Tr. 101.

{¶ 34} Zidan argues that because Abu Hamdeh testified that he “bumped” her in the face, that it proves she did not understand English. We disagree. Abu Hamdeh admitted that prior to trial, she never used the word “bumped” to describe what Zidan did to her. She told the neighbor that her husband was hitting her, she told police that her husband hit her, and she agreed with the prosecutor during her direct examination that she had also told him that her husband hit her.

{¶ 35} It is clear from the transcript and the overwhelming evidence presented that Abu Hamdeh, like many other domestic violence victims, was attempting to recant her story at trial. See *State v. Johnson*, 5th Dist. No. 2002CA00363, 2003-Ohio-1699 (victim recanted her story at trial; appellate court upheld conviction based on other evidence admitting, including the 911 call, the victim’s written statement on the night of the assault, photographs taken of the victim, and police officers’ testimony about what had occurred); *State v. Payne* (July 20, 2000), 8th Dist. No. 76539 (victim recanted her story at trial; this court upheld domestic violence conviction based upon other evidence admitted).

{¶ 36} Accordingly, we find Zidan’s trial counsel’s performance was not deficient and overrule his first assignment of error.

Right to Confront Witnesses

{¶ 37} In his second assignment of error, Zidan argues that he was denied his right to confront witnesses “by virtue of the fact that his wife speaks minimal English.”

{¶ 38} In this argument, Zidan failed to identify any legal authority that supports his assertion, in contravention of his duties under App.R. 16(A). Moreover, as we stated, a review of the record belies Zidan’s claims that his wife spoke “minimal English.”

{¶ 39} Zidan’s second assignment of error is overruled.

Jury Instruction on Self-Defense

{¶ 40} In his third assignment of error, it is not clear what Zidan is attempting to argue. His actual assignment of error reads: “The prosecution, in its case in chief, presented testimony that demonstrates the affirmative defense of self-defense.” But again, he cites no legal authority for this claim. His trial counsel neither argued self-defense in his opening statements nor in his closing arguments. Indeed, in his closing arguments, Zidan’s trial counsel argued that the state failed to prove “culpability” because the evidence only established that it was an accident. As the state points out, “[a]n instruction to self-defense would contradict this argument.” In light of this theory, defense counsel explicitly denied a self-defense instruction being charged to the jury when the trial court asked him if he wanted one. Thus, we cannot find any error on the part of the trial court.

{¶ 41} Zidan’s third assignment of error is overruled.

{¶ 42} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Rocky River Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

ANN DYKE, P.J., and
LARRY A. JONES, J., CONCUR